§523(a)(6) - failure to notify bank of location of abandoned vehicle — Debtor prevailed — Bank made no effort to collect for 18 mos. — that was true cause of injury.

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Savannah Division

In the matter of: MARCHELLE MONROE WILLIAMS ANDERSON (Chapter 7 Case 89-40124) Debtor GREAT SOUTHERN FEDERAL SAVINGS BANK Plaintiff v. MARCHELLE MONROE WILLIAMS ANDERSON Defendant	Adversary Proceeding Number 89-4043

FILED
at 1 O'clock & 35 min. P M
Date 8/21/89
MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia PCB

MEMORANDUM AND ORDER

The above-captioned case was tried on June 21, 1989. After consideration of the evidence and applicable authorities I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1) Plaintiff seeks to have a determination that a debt owed to it in the amount of $1,911.36 should be determined to be non-dischargeable based on the Debtor's alleged willful and malicious injury.

2) On or about September 18, 1984, Great Southern Federal Savings Bank ("Great Southern") loaned funds to the Debtor for the purchase of a 1978 Chevrolet Camaro automobile and retained a perfected security interest therein.

3) On or about May 1987 Debtor made her last payment to Great Southern on that debt. Approximately six months after that, in November 1987, Debtor was driving home from work when her car broke down late in the afternoon. She parked the car on the roadside and walked home. The following day she called the offices of Great Southern to inform Great Southern that on reflection she did not care to continue making payments on the car because she could not afford to do so and due to the mechanical condition which the car was in at that point. She asked for Cecile Prosser and when she was informed that Ms. Prosser was unavailable she left a message with an unknown agent of Great Southern that Great Southern could take possession of her vehicle.

4) Subsequently she discovered that the car was missing from the location where she had left it parked and called the City of Hinesville Police who informed her that the car had been towed to Blount's Service Station in that city. She attempted to contact Ms. Prosser on a second occasion to advise her that the car was located at Blount's but was unable to reach her and again left a message to that effect.

5) Since November of 1987 the collection file of the Debtor has been under the supervision of Ms. Prosser who never received either of the messages. Since that date, Great Southern has neither written nor telephoned the Debtor in an effort to reach her to determine the reasons for her non-payment or her intentions with respect to retention of the automobile. The automobile is still located at Blount's Service Station at the present time.

6) Debtor assumed that Great Southern had already picked up the automobile and only recently learned that the vehicle had not been repossessed and was still in the possession of Blount's.

CONCLUSIONS OF LAW

Plaintiff seeks to have the debt owing to it excepted from discharge pursuant to 11 U.S.C. Section 523(a)(6) which provides in relevant part that:

> "A discharge . . . does not discharge an individual debtor from any debt--
>
> (6) for willful and malicious injury by the debtor to another entity or to the property of another entity."

The Eleventh Circuit in Chrysler Credit Corp. v. Rebhan, 842 F.2d 1257 (11th Cir. 1988) approved and adopted the approach set forth in United Bank of Southgate v. Nelson, 35 B.R. 766 (M.D.Ill. 1983) in construing the "willful and malicious" element of 11 U.S.C. Section 523(a)(6). Under Southgate "willful means deliberate or intentional" and "malice for purposes of section 523(a)(6) can be established by a finding of implied or constructive malice". Rebhan at 1263. "Thus, the conversion must not be accidental or the result of negligence. Moreover, while 'malice' does not require an 'intent to harm', the debtor must know that the conversion is inconsistent with the rights of another." In re Alfred Dowdy, CV588-033, 6 (S.D.Ga. July 20, 1988) (emphasis original). Finally, "[t]here is no question but that the party seeking to except a debt from discharge must prove the willfulness and maliciousness of the act by clear and

convincing evidence." Rebhan at 1262, citing Matter of Wise, 6 B.R. 867 (Bankr. N.D.Fla. 1980).

"Injuries within the meaning of the exception are not confined to physical damage or destruction; but an injury to intangible personal or property rights is sufficient." 3 Collier on Bankruptcy, ¶523.16 at 523-118 (15th Ed. 1989).

"[A] willful and malicious injury does not follow as of course from every act of conversion, without reference to the circumstances. There may be a conversion which is innocent or technical, an unauthorized assumption of dominion without willfulness or malice. There may be an honest but mistaken belief, engendered by a course of dealing, that powers have been enlarged or incapacities removed. In these and like cases, what is done is a tort, but not a willful and malicious one." Davis v. Aetna Acceptance Co., 293 U.S. 328, 331, 55 S.Ct. 151, 153 (1934) (citations omitted).

As applied to the facts in this case I conclude that the Debtor should prevail. While the Debtor's testimony was impeached to some extent as to whether she had actually spoken directly with Ms. Prosser and although I conclude that she never spoke with her, it is clear that she made at least one effort to notify Great Southern of the location of her vehicle. She did

not sell the vehicle and retain funds; she did not strip the vehicle of valuable parts or in any other way act in a manner inconsistent with the rights of Great Southern. Based on the foregoing I conclude that she has committed no deliberate act, inconsistent with the rights of Great Southern. Thus there has been no malicious injury within the meaning of the Code. The actions of the Bank in making no significant collection effort on this account for a period of over eighteen months is much more clearly the cause of any diminution in value of the collateral or accrual of unpaid storage charges which form the basis for the Bank's claim of damages. More active and aggressive collection efforts on the Bank's part in November of 1987 forward would have mitigated if not eliminated those damages entirely. Therefore, I find that the debt is not excepted from discharge.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the debt of Marchelle Monroe Williams Anderson to Great Southern Federal Savings Bank is dischargeable in these proceedings and judgment is entered against the Plaintiff dismissing the complaint with

prejudice.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia
This 17th day of August, 1989.